THEOPILLAI v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Whyatt C.J. (S), and Good J.) May 3, 1956]

[K. L. — F. M. Criminal Reference No. 3 of 1956]

Criminal Procedure Code (Cap. 6), ss. 385 and 386 — Extent and scope of powers of the Public Prosecutor — Public Prosecutor cannot instruct a Magistrate to commit for trial to High Court a person whom the Magistrate had discharged in a preliminary inquiry.

The appellant in this reference was before the Magistrate's Court, Ipoh, on a preliminary enquiry into certain charges involving official corruption. At the conclusion of the case for the prosecution the learned Magistrate found that there were not sufficient grounds for committing the appellant for trial and discharged him.

On January 20, 1956 the Public Prosecutor called for the proceedings under section 385 of the Criminal Procedure Code, and on February 9, 1956 gave instructions under section 386 of the Criminal Procedure Code, instructing the Magistrate: "to re-open the preliminary enquiry against Theopillai and to conduct and conclude the same by committing the said Theopillai for trial before the Court of a Judge sitting in the High Court, Ipoh . . ." The appellant was arrested and brought before the Magistrate. On the request of the Court the proceedings were adjourned, and the matter was brought before the High Court. The learned Judge then heard arguments and made the following order: "That the Magistrate, Ipoh, do not proceed in accordance with the instructions of the Public Prosecutor herein dated 9th February 1956."

Held: the order made by the Public Prosecutor in this case was *ultra vires* the provisions of the Criminal Procedure Code.

CRIMINAL REFERENCE to the Court of Appeal.

R. P. S. Rajasooria for the appellant.

D. C. Jackson (Solicitor General) for the respondent.

Mathew C.J. (delivering the judgment of the Court): — This is a Reference under section 34 of the Courts Ordinance, 1948. The point for determination is :—

"Whether the powers of Public Prosecutor under section 386 of the Criminal Procedure Code (F.M.S. Cap. 6) to give instructions to the Magistrate with regard to an enquiry include a power to give instructions to conclude such enquiry by committing the accused person for trial by the High Court."

[The learned Chief Justice stated the facts as set out in the Headnotes above and continued :] We would say at the outset that we are in entire agreement with the judgment of the learned Judge who heard the application under section 57(1) of the Courts Ordinance, 1948; but we think it desirable to consider further the extent and scope of the powers of the Public Prosecutor under sections 385 and 386 of the Criminal Procedure Code.

The powers of the Public Prosecutor in relation to certain matters are laid down in Chapter XXXVII of the Criminal Procedure Code, sections 376-386. Sections 376-380 (inclusive) lay down who may prosecute. Section 381 gives the Public Prosecutor powers analogous to the filing of a *nolle prosequi* in England. Section 382 empowers the Public Prosecutor to direct the taking of further evidence. Section 383 permits of this being done by a Magistrate other than the one who held the preliminary enquiry. Section 384 permits of the Public Prosecutor altering or redrawing charges before the accused is tried in the High Court. Sections 385 and 386 read as follows :—

"385. Every Magistrate's Court shall, whenever required so to do by the Public Prosecutor, forthwith transmit to the Public Prosecutor the proceedings in any case in which an enquiry has been or is being held before such Court and thereupon such enquiry shall be suspended in the like manner as upon adjournment thereof.

"386. The Public Prosecutor upon the proceedings in any case being transmitted to him under the preceding section may give such instructions with regard to the enquiry to which such proceedings relate as he considers requisite, and thereupon the Magistrate shall carry into effect, subject to this Code, such instructions and shall conduct and conclude such enquiry in accordance with the terms of such instructions."

Section 385 enables the Public Prosecutor to send for proceedings which are not concluded and those which have been concluded. Section 386 empowers the Public Prosecutor "to give such instructions ... as he considers requisite and thereupon the Magistrate shall carry into effect, subject to this Code, such instructions". The underlining is ours.

We have not the slightest doubt that the only effective instructions which the Public Prosecutor can give are those which are in accord with the provisions of the Criminal Procedure Code and do not violate them. Section 385 empowers the Public Prosecutor to call for the proceedings in a preliminary enquiry which is still in being, in other words has not been concluded, and to call for the proceedings in a preliminary enquiry which has been concluded. Where an accused person has been committed for trial, there is no need to send for the proceedings under section 385, for the Public Prosecutor will have them under section 147 of the Criminal Procedure Code, and he can exercise his powers either under section 381 to discontinue the prosecution or under section 382 for the purpose of causing further evidence to be recorded. While the enquiry is still in being there are many instructions which properly could be given on the lines envisaged in section 140(iv) of the Criminal Procedure Code which reads :—

"When the Magistrate is of opinion that there are peculiar difficulties or circumstances connected with the case or whenever he shall be directed by the Public Prosecutor he shall remand the accused or admit him to bail and shall forthwith transmit the depositions to the Public Prosecutor in order that he may give such instructions as to him shall appear requisite."

It is not for us to say what instructions may properly be given on a preliminary enquiry that has been concluded by the discharge of an accused person. Had it been the intention of the legislature to give the Public Prosecutor the power to direct a Magistrate to reverse his order of discharge and commit the accused for trial, this power would have been expressed in plain and clear language. Why, indeed, should the Public Prosecutor be given this unusual power, when he has an appropriate remedy in that he can order the holding of another preliminary enquiry before another Magistrate?

We have no doubt that the order made by the Public Prosecutor in this case was *ultra vires* the provisions of the Criminal Procedure Code. The appeal against the decision to discharge is dismissed.

Order accordingly.

REG. v. LIM KWANG SENG & ORS.

[O. Cr. J. (Whitton J.) December, 21, 1955]

[Singapore — Criminal Motion No. 16 of 1955]

Criminal Procedure Code, 1955, ss. 241 & 406 — Criminal Justice (Temporary Provisions) Ordinance, 1954, s. 7 — Offence bailable as of right — Application for remand in public custody — Penal Code s. 147.

In this case eight persons were charged under s. 147 of the Penal Code, which is a bailable offence. The prosecution applied that the accused be remanded in custody for four days. This was opposed by counsel for the accused, who applied for bail. The learned Magistrate purporting to act under s. 241 of the Criminal Procedure Code, 1955, made the order for remand. The case was referred to the High Court under s. 7 of the Criminal Justice (Temporary Provisions) Ordinance, 1954.

Held: (1) the special procedural provision laid down in s. 7 of the Criminal Justice (Temporary Provisions) Ordinance, 1954, could not have been intended by the Legislature to abrogate the substantive right of bail conferred by s. 406 of the Criminal Procedure Code, 1955; (2) the learned Magistrate in this case should have acceded to the request of counsel of the accused and have offered them bail before deciding to grant a postponement under s. 241 of the Criminal Procedure Code, 1955.

CRIMINAL MOTION.

T. A. Mahony (Crown Counsel) for the Crown.

K. K. Bezboruah for the accused.

Whitton J. : — In this matter eight persons charged under section 147 Penal Code were remanded in custody, on the application of the Crown, for four days, despite a request for bail by their counsel. The Eighth Magistrate in making the order purported to act under section 241 Criminal Procedure Code. The case was then referred to the High Court under section 7 of the Criminal Justice (Temporary Provisions) Ordinance, 1954.

Now under section 406 Criminal Procedure Code any person accused of a bailable offence who is prepared to give bail must be released by the Police or the Court as the case may be. Presumably in so providing, although it does not say so, the section pre-supposes the bail contemplated will be of an amount which may reasonably be considered adequate to secure the accused person's further attendance at the proceedings. As then an offence under section 147 is bailable as of right, and since I do not think the special procedural provision laid down in section 7 of the Criminal Justice (Temporary Provisions) Ordinance can have been intended by the Legislature tacitly to abrogate the important substantive right of bail conferred by section 406, I am unable to see that reference to the High Court under section 7 can have any practical effect in cases such as this where the scheduled offence is a bailable one.

In my view the Magistrate before deciding to grant a postponement under section 241 should have acceded to the request by the Counsel of the accused and have offered them bail. Had this been done no question of the accused being remanded in custody without having had the opportunity to find bail could have arisen.

On these grounds I ordered the accused be offered bail.

Order accordingly.

SEET KOW SOO v. PUBLIC PROSECUTOR

[A. Cr. J. (Storr J.) December 15, 1955]

[J. B. — Criminal Appeal No. 27 of 1955]

Labour Code (Johore), Enactment No. 82, ss. 159 and 222 — Plea of guilty by "manager" who is not "owner" of estate to offence under s. 159(ii).

In this case the appellant, the manager of Kok Ann Estate, Pontian, pleaded guilty by letter to the offence under s. 159(ii) of the Labour Code, and the President of the Sessions Court convicted him and fined him $5,000. Sub-s. (ii) of s. 159 of the Labour Code reads: "Every employer who houses any labourer in a building the state of which, or of the surroundings of which, is such as to endanger the health or safety of such labourer shall be liable on conviction to a fine not exceeding one hundred dollars for each labourer housed in such building." On appeal against the sentence, —

Held: (1) s. 222 of the Labour Code makes it clear that although a manager can be proceeded against as the "employer" and convicted and fined, yet it is the owner against whom the section is aimed and it is the owner who, if the manager did not pay the fine, would have to pay, or the fine could be levied by distress and sale of the estate; (2) in the circumstances of the case, and in view of the high price of rubber and the probable profits made by the owners, the appellant's lack of care as to the housing of the labourers was a very serious matter, and therefore the sentence imposed by the President was not manifestly excessive.